IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1939.

No. 481

GUY A. THOMPSON, Trustee, MISSOURI-ILLINOIS RAILROAD COMPANY, Debtor,

Petitioner,

vs.

MAGNOLIA PETROLEUM COMPANY and THE OHIO OIL COMPANY,

Respondents.

BRIEF OF RESPONDENTS

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vs.

MAGNOLIA PETROLEUM COMPANY and THE OHIO OIL COMPANY,

Respondents.

BRIEF OF RESPONDENTS

JURISDICTION.

Respondents Respectfully Suggest that the Writ of Certiorari Was Improvidently Granted and Should Be Dismissed for the Following Reasons:

(a). There are no matters of general importance respecting the jurisdiction of the Bankruptcy Court involved. That Court had no jurisdiction, without consent of the parties, to adjudicate adverse claims to the title to prop-

erty, which was not in the actual or constructive possession of the Trustee. The decision of the Court of Appeals is in accord with such decisions of this Court as *Taubel-Scott-Kitzmiller Co., Inc.* v. *Fox, et al.*, 264 U. S. 426.

(b) The decision sought to be reviewed is not in direct conflict with the decision of the Court of Appeals of the Seventh Circuit, handed down November 6th, 1939, in *Carter Oil Co.* v. *Welker, et al., which decision is not final, as petition for rehearing is still pending.* Even if it were in conflict therewith, such conflict, without more, would not justify this Court in taking jurisdiction. (*Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202-206.)

(c) The decision sought to be reviewed is not in direct conflict with authoritative decisions of the Supreme Court of Illinois with respect to the conveyance of a strip of land in Illinois for use as a railroad right of way because the Courts of Appeal of both the Seventh and Eighth Circuits point out in their respective opinions that no case has been decided by the Illinois Court where the granting clause is identical with that in the deeds here involved.

(d) The decision sought to be reviewed in its interpretation of the words "over and across", as used in such a conveyance, is not in direct conflict with the decision of the Circuit Court of Appeals of the Fifth Circuit in *Kynerd* v. *Hulen*, 5 Fed. (2d) (C. C. A. 5th) 160-162, as the deed in that case did not purport to convey a strip of ground for a right of way for said railroad, and the words "over and across" referred to the railroad track and not to the land granted. Even if it were in conflict therewith, such conflict, without more, would not justify this Court in taking jurisdiction. (*Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202-206.)

(e) Under such circumstances this Court in the exercise of its discretion, of its own motion in many cases,

after submission of the case on briefs and arguments, has dismissed the writ of certiorari as being improvidently granted. (*Washington Fidelity National Ins. Co.* v. *Burton*, 287 U. S. 97-101, 102; *Layne & Bowler Corporation* v. *Western Well Works, Inc. et al.*, 261 U. S. 387-392, 393; *Southern Power Co.* v. *North Carolina Public Service Co. et al.*, 263 U. S. 508-509; *Keller et al.* v. *Adams-Campbell Co., Inc. et al.*, 264 U. S. 314-319, 320; *United States* v. *Rimer et al.*, 220 U. S. 547-548.)

STATEMENT.

Respondents deem it necessary, on account of the inaccuracies and omissions in petitioner's statement, to make a brief additional statement in order to properly state the issues presented in this case.

This controversy arises in a summary proceeding under Section 77 of the Bankruptcy Act (11 U. S. C. A. Sec. 205), for the reorganization of the Missouri Pacific Railroad Co., Debtor, and Missouri-Illinois Railroad Co., Subsidiary Debtor.

The Trustee (petitioner herein) filed a petition with the Reorganization Court, the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, which, in its essence, was a petition to quiet title to a part of the railroad right of way of the Subsidiary Debtor, Missouri-Illinois Railroad Company, located in Illinois.

The Trustee had succeeded to the title of the Subsidiary Debtor to the right of way which had been conveyed to predecessors of the Subsidiary Debtor by right of way deeds, two of which were dated in August, 1896, and one in January, 1898.

It was contended by the Trustee that these deeds conveyed to his predecessors in title the fee to the property in question. The granting clauses of these deeds are correctly set forth on pages 3 and 4 of petitioner's brief.

Respondents, who had served notice of their claim to the ownership of the oil and mineral rights in and underlying said premises (R. 2), were notified by registered mail of the filing of the petition, and directed to appear and be heard at the time of the presentation thereof. (R. 52-53)

Respondents appeared and filed answers to the Trustee's petition, contesting the jurisdiction of the Reorganization Court to adjudicate the question of title and to grant the Trustee the relief prayed for, on the ground that the deeds under which the Trustee claimed title conveyed no more than an easement or right of way for railroad purposes, and that they, by virtue of certain oil leases from the fee owners, were vested with title to all the oil and mineral rights under the right of way. They further challenged the jurisdiction of the Reorganization Court to grant the Trustee the requested power of a receiver *pendente lite* and the authority to drill on said right of way and to remove, conserve and market the oil and gas from said premises and out of the proceeds of the oil recovered to pay such expenses. (R. 35-51)

The Reorganization Court, after a hearing, found that the Trustee was in possession of and was vested with title to said oil and gas, and granted the Trustee all the relief prayed, vesting him with the powers of a receiver *pendente lite* without bond, and authorizing him to drill, market and sell the oil and to pay all expenses out of the proceeds thereof, and enjoining Respondents from asserting any rights or claims to the oil and gas other than in the reorganization proceedings and from interfering with the drilling of the wells and marketing the oil. (R. 52-57)

Upon appeal to the United States Circuit Court of Appeals of the Eighth Circuit that Court held, in accordance with the contentions of respondents, that said deeds granted only a right of way easement to the railroad company; therefore, it appeared on the face of the petition that the Trustee had no possession, actual or constructive, of the oil and gas rights, and that consequently the Court was without jurisdiction to enter the order. The case is reported in 106 Fed. (2d) 217, and the full opinion appears on pages 137-156 of the Record.

Petitioner has gone beyond the record in his statement that 13 oil wells have been drilled by petitioner on the right of way of the Missouri-Illinois Railroad Company through the Salem oil field under the orders of the Bankruptcy Court here involved and under similar orders respecting other portions of the right of way not directly involved here. Petitioner further states that, pending the appeal in this case, the money received from the sale of oil aggregated $472,000, that approximately $225,000 of that amount had been spent for drilling, producing and marketing said oil, and that the balance is impounded in a special account pending the further orders of the Bankruptcy Court.

These statements are confusing because many of the wells referred to were drilled on parts of the right of way not involved here.

This money evidently represents the proceeds of oil produced from all of said wells and is money to which respondents and others may be entitled. Petitioner's experts testified that, in their opinion, there were only about 10,000 barrels of oil per acre beneath the 8 acres covered by the right of way across the land described in the deeds set out in Trustee's petition in the Bankruptcy Court. This would amount to approximately 80,000 barrels of oil

and would have a value of approximately $80,000. The experts further testified that, because wells on the right of way would drain oil from the surrounding territory, Trustee might expect to recover approximately 400,000 barrels of oil. (R. 109-111) This drainage to the right of way here involved is from land under lease to respondents. The right of way acreage here involved is only a part of the property covered by the oil and gas leases owned by respondents.

The order of the Bankruptcy Court contemplates that, even if Trustee is unsuccessful in establishing the fee simple title claimed by him, these funds, being the property of respondents and others, may be used to pay the cost of drilling, producing and selling the oil which belonged to respondents and others.

SUMMARY OF ARGUMENT.

I.

The writ of certiorari was improvidently granted and should be dismissed.

(a) A conflict between Circuit Courts of Appeals on questions controlled by State law is not of itself a reason for granting the writ of certiorari.

(b) The decision sought to be reviewed is not in direct conflict with authoritative decisions of the Supreme Court of Illinois.

(c) The Bankruptcy Court had no jurisdiction, without consent of the parties, to adjudicate claims to the title to the property which was not in the actual or constructive possession of the Trustee or to enter a preliminary order granting the Trustee powers of a receiver *pendente lite* and authorizing him to drill oil wells upon the premises and pay for same out of the proceeds of the oil recovered therefrom.

(d) Where this Court finds, after submission of the case on briefs and arguments, that the writ of certiorari should not have been granted, said writ will be dismissed by the Court on its own motion as having been improvidently granted.

II.

The conveyances to the Centralia and Chester Railroad Company of strips of ground "for right of way" "over and across" certain described real estate where said railroad is now located do not convey the fee but only convey an easement for railroad right of way purposes, so that no right to take oil and gas from under the strips of land passed to the railroad under said conveyances.

(a) The deeds in question do not convey a fee simple under Section 12 of the Illinois Conveyancing Act, because a less estate appears to have been granted and conveyed thereby by construction or operation of law.

(b) Where words of inheritance are not used in a deed, every word, clause or term must be given weight in determining the estate granted, rejecting none as meaningless or surplusage.

(c) In construing instruments of this character, Courts will look to the object to be attained in order to ascertain and give effect to the intention of the parties, and where an easement in land is conveyed which may well co-exist and be enjoyed and used by grantee consistently with ownership of the fee in grantor, the fee does not pass because it is not essential to the right or interest which is described in the deed.

(d) The use of the words, "a strip of ground," "for right of way for said Company," "over and across" show the expressed intent to convey only an easement and not a fee.

(e) The grant of a right of way to a railroad company does not convey a fee in the land, but conveys an easement only.

(f) The decision of the District Court and the Circuit

Court of Appeals of the Seventh Circuit in the case of *Carter Oil Co.* v. *Welker* is contrary to the Illinois authorities and the overwhelming weight of authority in other jurisdictions.

(g) The Illinois cases involving the question of whether certain language constituted a condition subsequent or restrictive covenant and as to whether the property would revert on condition broken are not applicable to the issue here presented as to whether the deeds convey a fee or an easement.

(h) Where gores or strips across land are conveyed, public policy favors the construction that an easement only is conveyed.

(i) The Circuit Court of Appeals of the Eighth Circuit, in the absence of a controlling decision of the Supreme Court of Illinois, applied the Illinois rules of conveyancing and also followed the great weight of authority in other jurisdictions holding that conveyances containing like granting clauses convey only an easement and not the fee.

III.

These deeds do not convey a base or determinable fee because there is no condition or limitation on the grant of a fee therein but only a description of the estate granted, which is an easement.

IV.

If it be held that the deeds conveyed only an easement, so that the Trustee had neither actual nor constructive possession of the oil underlying the right of way, then the Bankruptcy Court had no jurisdiction to authorize the Trustee to drill wells on the right of way and pay the cost of same out of the oil produced, but the entire order and all its terms were void.

ARGUMENT.

MAY IT PLEASE THE COURT:

I.

Respondents respectfully suggest that the writ of certiorari was improvidently granted in this cause.

The supervisory jurisdiction of this Court, under Section 240 of the Judicial Code (Title 28, Section 347 U. S. Code), differs from the jurisdiction exercised upon appeal in its underlying purpose. Under well-established principles, the power of this Court in granting writs of certiorari is to be exercised sparingly and only in cases of gravity and general importance, or to secure uniformity of decision. (Rule 38, Rules of Supreme Court.)

A study of petitioner's brief inevitably raises the question as to whether or not the writ herein was improvidently granted in the first instance. This question is particularly pertinent in the light of this Court's holding in *Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202-206, that a conflict between circuits on questions controlled by state law is not of itself a reason for granting the writ.

Respondents believe that it is apparent that petitioner's brief sets forth no basis for issuing the writ within the meaning of the rules of this Court and that in practical effect the writ is serving no other purpose than to grant petitioner a second appeal in the same cause.

Respondents raise this question because under established authority of this Court under such circumstances the writ will be dismissed by the Court. (*Washington*

Fidelity National Ins. Co. v. *Burton*, 287 U. S. 97-101, 102; *Layne & Bowler Corporation* v. *Western Well Works, Inc. et al.*, 261 U. S. 387-392, 393; *Southern Power Co.* v. *North Carolina Public Service Co. et al.*, 263 U. S. 508-509; *Keller et al.* v. *Adams-Campbell Co., Inc. et al.*, 264 U. S. 314-319, 320; *United States* v. *Rimer et al.*, 220 U. S. 547-548.)

The determinative question in this cause, as appears from the statement of facts and record, is a question to be determined under the local law of the State of Illinois. It involves a construction of deeds executed and delivered in Illinois relating to property situated in that state. The petitioner contends that the proper construction of these deeds vests fee simple title to the property involved in the petitioner's predecessor in title. The respondents contend that the proper construction of these deeds is that they granted only an easement for a railroad right of way to petitioner's predecessor in title.

The petitioner's choice of the forum, by his institution of the summary proceedings in the reorganization of the Missouri Pacific Railroad Company in the United States District Court in Missouri, resulted in the ultimate determination of this question by the United States Circuit Court of Appeals for the Eighth Circuit.

In addressing itself to this problem, the Court below used the following criterion (R. 145):

> "Counsel for the parties agree that since the land in question is situated in Illinois the construction of the deeds is controlled by the laws of that state. *Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202; *Benedict* v. *Ratner*, 268 U. S. 353; 359; *Buford* v. *Kerr*, 8 Cir., 90 F. 513, 514. *No Illinois decision has been found in which a deed or other conveyance has been construed where the granting clause is identical with that found in the deeds under consideration.* Under these circumstances we have no choice but to analyze the issues for

> ourselves, exercising an independent judgment with respect to the issues presented, aided by and with deference to the Illinois law of conveyancing." (Italics ours.)

The foregoing method of approach is in accord with established judicial precedent under such circumstances and is not subject to criticism. It was contended below by appellee, petitioner here, that a decision of the United States District Court for the Eastern Judicial District of Illinois in the case of *Carter Oil Co.* v. *Welker*, 24 Fed. Supp. 753, also involving a railroad right of way deed, was parallel on its facts and should be controlling on the Court of Appeals in reaching its decision. It was recognized by the Court of Appeals for the Eighth Circuit that a decision of the Federal courts on a question of local law, which had not previously been determined by the courts of the state, was not binding either upon the courts of the state involved or on other Federal courts, hence the Court of Appeals did not consider itself bound by the *Welker* case.

Without deciding that the *Welker* case was parallel on its facts, which both the Court of Appeals and respondents question, the Court below nevertheless gave that opinion due consideration as appears from this language in its opinion (R. 154):

> "We are not unmindful that in construing *a deed somewhat similar* to the deeds involved in this case the District Court of Illinois in *Carter Oil Co.* v. *Welker*, 24 F. Supp. 753, reached the conclusion that the deed vested a fee simple title in the railroad company, and not an easement. While that decision commands great respect, insofar as it is inconsistent, *if at all*, with the views herein expressed, we are not inclined to follow it." (Italics ours)

The opinion of the Circuit Court of Appeals in this respect is also in accord with orderly procedure and judicial precedent under such circumstances.

Subsequent to the decision of the Court of Appeals in this cause and after the motion for rehearing had been overruled and disposed of, and even after petition for certiorari had been filed in this Court, the United States Circuit Court of Appeals for the Seventh Circuit handed down its decision in the case of the *Carter Oil Co.* v. *Welker et al.*, affirming the decision of the District Court of Illinois. *A motion for rehearing in that cause has been filed and is yet undisposed of.*

Even assuming the cases are in conflict, which respondents deny, both involve questions of local law upon which there is no controlling decision of the Illinois state courts. This was recognized in the opinions of both the Eighth Circuit and the Seventh Circuit. The finding of the Eighth Circuit on this question in *Magnolia Petroleum Co.* v. *Thompson, et al.*, 106 Fed. (2nd) 217 (R. 145) is set out above. The finding of the Seventh Circuit in *Carter Oil Co.* v. *Welker, et al.* (Petitioner's Br., p. 46), is as follows:

> "Whether the particular form of deed here involved results in the creation of a fee simple interest in the grantee or only an easement *has never been determined by the Illinois Courts so far as we can find.*" (Italics ours)

Under such circumstances even the decision of this Court as to the question of local law involved will not be binding on the courts of Illinois. They alone, under our system, have the authority to declare the law of their state relating to real estate and the Federal courts have felt bound to follow their decisions even from an early day. *Suydam* v. *Williamson*, 24 How. (U. S.) 427. "No decision at the present time could reconcile any 'conflict of circuits,' or do more than enunciate a tentative rule to guide particular federal courts." *Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202-206.

It would seem, therefore, that the writ of certiorari had been improvidently issued in this cause under the ruling of this Court in that case. Although the *Ruhlin* case involved a question of commercial law and the decision is a corollary to the decision of this Court in *Erie Railroad Co.* v. *Thompkins,* 304 U. S. 64, the holding of this Court in that case is equally applicable to the present cause in that even prior to the decision of the *Erie* case there has never been any question since an early date but that the Federal courts would follow state decisions on questions of local law.

The foregoing is also an answer to a somewhat minor contention of petitioner that the decision sought to be reviewed is in conflict with a decision of the Fifth Circuit in the case of *Kynerd* v. *Hulen,* 5 Fed. (2d) 160, which case also involved a question of the local law of the State of Texas.

As the Courts of Appeals of both the Seventh and Eighth Circuits have held there is no controlling Illinois decision construing deeds with similar granting clauses, there can be no conflict with "a long line of authoritative decisions of the Supreme Court of Illinois" (Pet. Br. 2), as petitioner contends. (Pet. Br. 16) The authorities there cited by petitioner deal with another field of Illinois property law, that is, the question of whether or not an admittedly granted fee is limited by other language in the deed. These cases are completely distinguishable from the issue involved in this case. (See pp. 32-36, this brief.) It, therefore, follows under the issues urged by petitioner, the only other conceivable basis of certiorari is that the Court below in its decision reached a conclusion contrary to prior rulings of this Court as they relate to the Bankruptcy Act.

Petitioner's contention in this respect is founded upon

the decision of this Court in *Taubel-Scott-Kitzmiller Co., Inc.* v. *Fox et al.*, 264 U. S. 426. (Pet. Specification of Errors, brief, pp. 7, 8)

The burden of petitioner's contention seems to be that the Court of Appeals erred in failing to hold that the Bankruptcy Court had jurisdiction as a preliminary inquiry to determine the question of possession on which its jurisdiction to determine the ultimate merits of the controversy depended. (Petitioner's brief, p. 7, and part II of petitioner's argument, pp. 34, 40)

In this contention petitioner is clearly in error as is established by the record below.

Petitioner of his own volition instituted this proceeding in the District Court as a summary proceeding in the reorganization of the debtor railroad company. Respondents were notified by registered mail of the filing of the summary petition and that the Trustee claimed title to all of the oil underlying the subsidiary debtor's railroad right of way in the property involved, which was also claimed by respondents under oil and gas leases.

All parties recognized that the jurisdiction of the Bankruptcy Court as to the adverse claims asserted depended upon the Trustee being in actual or constructive possession of the property in controversy, namely the oil and gas underlying the right of way. This is the extent of the Bankruptcy Court's summary jurisdiction as directly ruled by this Court in *Taubel-Scott-Kitzmiller Co., Inc.* v. *Fox et al.*, 264 U. S. 426-433.

The Trustee's claim to possession was dependent upon the construction of the deeds to Trustee's predecessor in title. If they conveyed a fee, then it followed that the Trustee had actual or constructive possession. The basis of the claim, that is the granting clauses of the deeds, were set out in Trustee's petition. (R. 3-4)

The answer of respondents in the District Court appropriately put in issue the jurisdictional question. See a summary of these answers in the opinion of the Court of Appeals, 106 Fed. (2d) 217. (R. 140-141)

It was thoroughly understood by all parties at the time of the hearing in the District Court that the proper construction of the deeds appearing on the face of the petition would be determinative of the Court's jurisdiction. Counsel for petitioner so advised the Court. (R. 100-102) This was also summarized by the Court of Appeals in its opinion. (R. 141-142)

The Court of Appeals then concluded (R. 143):

> "The first question presented upon this appeal, as it was the first question for the determination of the court below, relates to the jurisdiction of the District Court as a Court of Bankruptcy to determine in a summary proceeding the adverse claims to the fee title to the land underlying the railroad right of way in which the oil deposits are found."

It follows, therefore, on the record that the District Court did have an opportunity to decide in the first instance its jurisdiction to entertain the proceedings. Under the issues the determination of this question also determined the merits of the controversy since that question was dependent upon a construction of the deeds.

The Court of Appeals in its opinion found that the District Court determined the question of its jurisdiction erroneously from facts appearing on the face of the petition, namely, the granting clauses of the deeds involved. The Court of Appeals properly ruled that since the lower court had erroneously determined its jurisdiction and had none to entertain the cause, because the Trustee was neither actually or constructively in possession of the oil and gas underlying the right of way, then it necessarily

followed that all of the orders and findings as well as the decision of the District Court were null and void.

Respondents respectfully suggest that the issuance of a writ of certiorari in this case was unwarranted in that the Court below, in reaching its decision, carefully and meticulously followed judicial precedent relating to the Bankruptcy Act. Further, assuming that the decision in this case is in conflict with the decision of the Seventh Circuit in *Carter Oil Co.* v. *Welker,* certiorari is unjustified because both decisions relate to a question of local law undetermined by the courts of Illinois.

Under such circumstances this Court in its discretion may dismiss the writ of certiorari as improvidently granted.

Respondents respectfully suggest that it is important that this Court do so for the reasons assigned by this Court in the case of *Layne & Bowler Corp.* v. *Western Well Works, Inc.* 261 U. S. 387-392, 393, and pointed out in the case of *Washington Fidelity National Ins. Co.* v. *Burton,* 287 U. S. 97-101, in the following language:

> "It thus appears that the construction of the statute which we were asked to review is not in the case, and, even if it were, it is of local significance only. The conflict of decisions asserted is not shown. Plainly the question is not of such general interest or importance as under the rules and practice of this Court warrants its review upon certiorari. For these reasons, it is the duty of this court to dismiss the writ as improvidently granted."

However, if this Court is not disposed to dismiss the writ of certiorari and decides to review the opinion of the lower court, respondents believe that they can satisfactorily demonstrate to this Court that the decision of the Court below was proper.

II.

The deeds conveying "a strip of ground for right of way for said company * * * over and across" the real estate described, granted only an easement for railroad purposes and conveyed no interest in or to the minerals, oil and gas underlying the same to the predecessors in title of petitioner.

If this court decides to review the decision below, the real question for decision is "What is the intention of the parties expressed in these particular deeds?" It is conceded by both the Courts of Appeals of the Seventh and Eighth Circuits that no case has been decided by the Supreme Court of Illinois where the granting clause is identical with that in these deeds. However, since the real estate in question is located in Illinois, the question of the meaning of these instruments must be determined by the Illinois law on the construction of deeds insofar as the same is applicable. As the deeds here under consideration are in the statutory form without words of inheritance, they must be construed with reference to the Illinois statutes and decisions pertaining to that form of conveyance.

Statutes and Applicable Rules of Construction.

Section 12 of the Illinois Conveyancing Act (Chapter 30, Par. 12, Ill. Rev. Stat. 1939) provides that every estate in lands which shall be granted, conveyed or devised, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee simple estate of inheritance, if a less estate be not limited by express words, or do not appear to have been granted, conveyed or devised by construction or operation of law. (Br. 13)

Under this section, where words of inheritance are not used, but the deed is in the form provided by Section 8 of the Illinois Conveyancing Act (Chapter 30, Paragraph 8, Ill. Rev. Stat. 1939), and merely "conveys and warrants" to a specified grantee, without words of inheritance, the entire context of the deed must be considered, every word, clause or term must, if possible, be given weight in determining the estate granted, rejecting none as meaningless or surplusage, and a fee simple does not pass, if a less estate is limited by express words or appears to be granted by construction or operation of law (*Woods* v. *Seymour*, 350 Ill. 493-496, 183 N. E. 458; *Harder* v. *Mattheus*, 309 Ill. 548-554, 141 N. E. 442; *Bauman* v. *Stoller*, 235 Ill. 480-492, 85 N. E. 657.)

In the case of *Bear* v. *Millikin Trust Co.*, 336 Ill. 366-381, the same rule is announced in the following words:

> "In a deed in which words of inheritance are not used, the entire context of the instrument may be considered, and every word used, wherever found, must, if possible, be given weight in determining the estate granted."

In the deeds under consideration no words of inheritance are used and, therefore, it is imperative that every word, clause or term used must, if possible, be given weight in determining the estate granted, rejecting none as meaningless or surplusage.

In the case of *Waller* v. *Hildebrecht*, 295 Ill. 116-118, a warranty deed conveyed the east ten feet of lot 7 and the south ten feet of lot 6 "to be used as alley, only, in common by both parties hereto." In determining the meaning of said deed the Court said (page 121 of the opinion):

> "In construing instruments of the character of this warranty deed, the courts will look to the cir-

cumstances attending the transaction, the situation of the parties, the state of the thing granted and the object to be attained, to ascertain and give effect to the intention of the parties * * *.

"If this deed represents the whole transaction we are unable to understand the purpose of it. It seems clear, however, from the language of the deed, that no more interest was intended to be given in lot 6 than a *right of way* over the south ten feet of it. Generally speaking, where a particular or special right or easement in land is conveyed, which may well co-exist and be enjoyed and used by the grantee consistently with the ownership of the fee in the grantor, the fee does not pass *because it is not essential to the right or interest which is described in the deed.* (19 Corpus Juris, 909)." (Italics ours.)

Here it is apparent that the object to be attained was the grant to the railroad of an easement or right of way over the land so a railroad could be operated thereon. This easement might well be enjoyed and used by the railroad consistently with the ownership of the fee in the grantors and, therefore, the fee did not pass because it was not essential to the right or interest described in the deeds. Petitioner fails to point out why the railroad needed the fee in order to build and operate a railroad over and across this land, and cannot do so.

It is not essential that express words of limitation be used if it appear by necessary implication that a less estate was granted. (*Lehndorf* v. *Cope*, 122 Ill. 317-327; *Hempstead* v. *Hempstead*, 285 Ill. 448-453.)

In the construction of deeds to which the Conveyancing Act is applicable, the primary object is to ascertain and give effect to the intention of the parties unless to do so will violate an established rule of property. (*Cover* v. *James*, 217 Ill. 309-313; *Bear* v. *Millikin Trust Co.*, 336 Ill. 366-381; *Woods* v. *Seymour*, 350 Ill. 493-496).

In ascertaining the intention of the parties, the courts are not confined to the strict and literal construction of the language used when to do so will frustrate the intention of the parties as gathered from the instrument. (*Kearney* v. *Kirkland*, 279 Ill. 516-524; *McCoy* v. *Fahrney*, 182 Ill. 60-64; *Bear* v. *Millikin Trust Co.*, 336 Ill. 366-380.)

A fee simple and a perpetual easement are both freeholds. (*Funston* v. *Hoffman*, 232 Ill. 360-363.)

This case can not be determined by the application of rules of property which fasten a specific import and meaning upon particular language employed in a deed and state arbitrarily the legal effect which such language will have, such as the application of the Rule in Shelley's Case, but must be decided by application of rules of construction of the language in the particular deed in the light of the circumstances under which it was made. By harmonizing all the language of these deeds in an attempt to arrive at their meaning by the application of generally accepted rules of construction, the intention of the parties as expressed in the language of these deeds, viewed in the light of all the surrounding circumstances, compels the conclusion that an easement only was granted thereby.

Application of these principles.

All of the conveyances to the Centralia & Chester Railroad Company, predecessor in title to the petitioner Trustee, contain substantially the same language. The first conveyance described in the petition is a "strip of ground for right of way for said company 60 feet wide over and across" certain described real estate. (R. 3) The other conveyances are the same except that deeds 2 and 3 use the words "for said railroad company" rather than "company." (R. 3-4) In the last deed, in addition

to the foregoing language, the following language appears after the description:

> "It being the strip of land over and across said above described tracts of land where the said railroad is now located." (R. 4)

The deeds also vary in that the second deed grants a strip 66 feet wide rather than 60 feet wide as in the others. Each deed is designated as a warranty deed.

It is the contention of the petitioner Trustee that these deeds convey a fee to the grantee and not an easement for railroad purposes. To so construe these deeds is to ignore the words *"a strip of ground," "for right of way for said Company," "over and across."*

Were these words idly used by the parties to the deed? Obviously not. If the parties intended to convey a fee simple absolute, these words were useless and meaningless. It is apparent that the expressed intent of these instruments was to convey only an easement. The railroad grantee obviously was not then bargaining for the fee. It needed only a right of way. It did not need the fee and had no intention of obtaining one. The question of the fee did not arise until after oil was discovered in the vicinity of the right of way. Then, and only then, did the successors in title look back to the deeds and decide that a fee had been conveyed. They are now attempting to get more from their grantors than they ever bargained for or intended to get.

The meaning of the parties to these deeds is rendered clear beyond question by the words "over and across." A deed intending to convey in fee a strip of ground out of a larger tract would never contain the words "over and across." Such a deed would describe merely a smaller part of the larger tract. A deed conveying a

small part out of a larger tract is not "over and across" said tract, but, on the contrary, is a conveyance of a smaller part thereof.

At the time these deeds were executed, as evidenced by the wording contained in the deeds, the parties were dealing with and bargaining "for a right of way." A right of way by its very nature, as the words indicate, is a right of passage "over and across" certain described real estate. The parties, to make doubly certain to express their intent, used in the deeds not only the term "right of way," but the words "over and across." When the words "over and across" are used in conjunction with what the parties were dealing with, namely, a right of way or right of passage, it is apparent that they expressed in clear, unambiguous words their meaning, that is, an easement, not a fee-simple title absolute.

Also in construing these deeds it is important to consider the position of the parties to these instruments. The grantors were farmers conveying a narrow strip across their farms. They undoubtedly had in mind, as expressed in the deeds, granting to the railroad an easement "over and across" their property so long as it was being used for railroad purposes. They doubtlessly never considered or intended to grant to the railroad the fee-simple ownership so that the railroad might turn the property to some use which might be detrimental to their own use of the property.

That this is important in the construction of railroad right of way deeds is pointed out in the case of *Abercrombie* v. *Simmons*, 71 Kans. 538, 81 Pac. 208, wherein the Court in its opinion (page 210) states:

> " * * * May a railroad company purchase a strip of land extending a great distance through the coun-

try and over many farms, abandon the enterprise, and then sell the strip to those who will put it to a wholly different use; one which might be both obnoxious and menacing to the adjoining owners?"

The Court in the above cited case answered the question in the negative, and this case and the thought therein expressed has been cited with approval by the Supreme Court of Illinois in *Branch* v. *Central Trust Company*, 320 Ill. 432, where the Court said on pages 440 to 442 of the opinion:

> "The grant to a railroad company of a right of way over, through and upon land described does not convey the fee to any part of the land described but only the right to use the land for railroad right of way purposes. * * *
>
> "These cases make it clear that in this State a grant of a right of way to a railroad company does not convey a fee in the land but conveys an easement, only * * *."

The words used in these deeds negative any intent on the part of the grantor to convey a fee simple absolute to the property in dispute. Any attempt to so construe the deeds does violence to the clearly expressed intent contained in the deeds. To so construe the deeds it would be necessary to entirely ignore these words "right of way" and the words "over and across." Such a construction would be contrary to every sound principle of construction and the decisions of the Supreme Court of Illinois.

The intention of the parties is further manifest by the use of words "over and across." Obviously, these words, as held by the Court below, modify the words "a strip of land." The parties, not having described the land conveyed by metes and bounds, met this deficiency by describing the land as a strip of land over and

across a certain section of property. If the words are not so employed, the grant is a nullity. To illustrate this contention, we take the granting clause and delete the words "over and across," as follows:

> "A strip of land for right of way for said railroad company sixty feet wide—the southwest quarter (1/4) of the northeast quarter (1/4) of Section Twenty (20), Town Two (2), North, Range Two (2) East of the Third Principal Meridian."

So deleted, the grant is meaningless.

Petitioner attempts to meet this dilemma by arguing that the words "over and across" modify the words "right of way" rather than the words "a strip of land." This also is a distinction without a difference. It seems obvious that the term "for a right of way over and across" is equally descriptive of the intent to convey an easement rather than a fee. However, speculation as to which words they modify is needless, in view of the manifest intent appearing from the final words in the Rusler deed (R. 3-4), which contains the following additional phrase:

> "It being the strip of land over and across said above described tracts of land where the said railroad is now located."

This, beyond peradventure of doubt, indicates that it was the intention of the parties in these deeds that the words should modify the words "a strip of land," and demonstrates the intention of the parties to convey no more than an easement.

The language quoted from the decision of the Court of Appeals in this case on page 31 of petitioner's Brief is a complete answer to this argument.

The case of *Kynerd* v. *Hulen*, 5 Fed. (2nd) (C. C. A. 5th) 160-162, is not in conflict with the decision of the

Court of Appeals, because in that case the deed did not anywhere purport to convey a right of way or a strip of ground for a right of way. It nowhere contained in the granting clause the language "for a right of way for said railroad company"? or any similar language, as is true of the deeds in the case at bar. Furthermore, the words "upon, over and across" in the deed before the Court in the *Kynerd* case referred to the railroad track and not to the land granted. The land granted was described by metes and bounds.

Also, the *Kynerd* case involved questions relating to real estate located in Texas. The Federal Courts have always followed the laws of the several States as to questions of title to real property. If there is a conflict between the Kynerd case and the instant case, which respondents do not admit, it may well be due to the difference between the conveyancing laws of the State of Illinois and those of the State of Texas.

The same is true of the case of *Brightwell v. I. G. N. Ry. Co.*, 121 Tex. 338, 49 S. W. (2nd) 437-440, also cited by petitioner. There, the granting clause did not purport to convey a strip of ground for right of way, and did not contain in the granting clause the language "for a right of way for said railroad company."

Petitioner, throughout his brief, derives great comfort out of repeatedly stating one isolated principle of construction frequently employed by the Courts of Illinois that in case of ambiguity a conveyance is to be construed in favor of the grantee and against the grantor. For example, see pages 15, 28 and 34 of petitioner's brief.

To put it another way, this is the boot strap by which petitioner attempts to extricate himself, in the course of his argument, from any unsatisfactory dilemma.

Whenever there is a controversy over the meaning of a written instrument, the question of construction arises; that is, the intention of the parties to the instrument under consideration must be determined. In the final analysis, all principles of construction are directed to the proper ascertainment of the intention of the parties. There is no magic in any such principles, and they may not be employed to arrive at a conclusion which is obviously contrary to the intention of the parties. If so, then the very purposes of the aids to construction are lost sight of and they are aids to injustice rather than justice.

Respondents' contention that these deeds conveyed no more than an easement for railroad purposes gives force and effect to every word contained in the deeds, carries out the expressed intent of the parties, and gives to the grantees that which they bargained for. This construction, therefore, is in accord with sound principles of construction supported by the great weight of judicial authority, including Illinois.

Illinois Cases on Right of Way Deeds.

Railroad right of way deeds have been a fruitful source of litigation in every jurisdiction in the United States. Illinois, where the property in question is located, is no exception. The Courts of last resort of that State have unanimously ruled that a deed granting a right of way to a railroad grants to the railroad only an easement for railroad purposes rather than a fee.

In the following cases involving railroad right of way deeds, the Illinois courts held that the railroad acquired an easement rather than a fee-simple title. The deeds involved in these cases use less strong language of an

intent to convey less than the fee than the deeds here under consideration.

In the case of *Wiggins Ferry Co.* v. *O. & M. Ry. Co.*, 94 Ill. 83-92, a conveyance of "the right to construct, maintain and use, in, through, upon and over" certain lands, railroad tracks, was held to create only an easement.

In the case of *I. C. R. R. Co.* v. *Houghton*, 126 Ill. 233-236, 18 N. E. 301, the deed conveyed a right of way "over and through" a certain tract for the purpose of constructing a railroad, "to have and to hold the same to the plaintiff and its successors and assigns forever, for all lawful uses and purposes incident to a full and indefeasible title in fee simple," and it was held that even with such language in the habendum clause the railroad acquired only an easement.

In the case of *I. C. R. R. Co.* v. *O'Connor*, 154 Ill. 550, 39 N. E. 563, the conveyance to the railroad contained the same language as that in the Houghton case, *supra*. The Court cited the Houghton case with approval and arrived at the same result.

In the case of *Walker* v. *I. C. R. R. Co.*, 215 Ill. 610-612, 613, 74 N. E. 812, for a recited consideration of $21,310.00, the grantee "* * *" does grant, bargain, sell" to the railroad company and "their successors and assigns, for the purpose of constructing, maintaining and operating thereon" a railroad, "the right of way for the same over and through" certain tracts of land, "to have and to hold the same unto the said Illinois Central Railroad Co., their successors and assigns forever. * * *" The Court in that case held that such language evidenced an intent to convey an easement rather than a fee to the railroad.

In the later case of *Branch* v. *Central Trust Co.*, 320 Ill. 432-440, 151 N. E. 284, the Court, summarizing the Illinois law on the subject, ruled:

> "The grant to a railroad company of a right of way *over, through and upon land described does not convey the fee to any part of the land described, but only the right to use the land for railroad right of way purposes.*" (Italics ours.)

After reviewing the Illinois authorities the Court in this case further rules, on page 442:

> "These cases make it clear that in this state *a grant of a right of way to a railroad company does not convey a fee in the land, but conveys an easement only;* and the same view has been expressed by the courts of other jurisdictions. (Citing authorities.) *A conveyance of land by general warranty deed to a railroad company for railroad purposes was held in Chouteau* v. *Missouri Pacific Railroad Co.*, 122 Mo. 375, *not to convey a fee*, and a deed of general warranty which by its language purported to convey to a railroad company land described as 'all the lands in the southwest quarter of section 13, township 9, south of range 7 west, lying within 50 feet of the center line of the main track of said railroad,' without any reference to the purpose of the conveyance or the use of the land, was construed by the Supreme Court of Kansas as conveying an easement, only, where it appeared that the railroad company had surveyed and staked out the line for its railroad and when about to begin the construction of the railroad over the grantor's land purchased from him the strip of land 100 feet wide running through the quarter section (*Abercrombie* v. *Simmons*, 71 Kan. 538). (Italics ours.)
>
> "Section 13 of Article II of the Constitution provides that the fee of land taken for railroad tracks without consent of the owners thereof shall remain in such owners subject to the use for which it is taken. The easement acquired by the railroad company ceases upon abandonment by the company, and

the owner of the fee, or his heirs or grantees, may recover by ejectment the possession of the land in which the right of way had existed (*Chicago and Eastern Illinois Railroad Co.* v. *Clapp*, 201 Ill. 418). The Constitution, the statute and the courts recognize the existence of the fee in the original owner and of the easement in the railroad company, and if this is the nature of estates where the right of way is acquired by condemnation, there is no reason why the parties may not by contract create the same estates. This is what was done by the Mandell deed."

If, as held in the above cases, the words "A right of way upon" or a "right of way over and through" are construed to convey an easement rather than a fee, then it follows that the language employed in these deeds, namely, "for a right of way for said company over and across" must be similarly construed. There is no difference in the meaning between the phrases or in the intent which they express.

Petitioner recognizes the force of these authorities. At page 22 of his brief, *et seq.*, it is conceded that under Illinois law "the conveyance of a right of way is the conveyance of an easement." To meet this situation, it is argued that a distinction exists between the conveyance of "a right of way" and the conveyance of land "for a right of way over and across property." Petitioner admits that the former conveys an easement, and argues that the latter language conveys a fee. Respondents submit that any purported distinction is a distinction without substance, is a play on words, and is not sufficiently substantial upon which to base the determination of the ownership of valuable rights in property. In the final analysis, the validity of such a distinction must depend upon whether or not the difference in the language indicates a difference in the intention of the parties to the

instrument. It seems clear without argument that the intention of the parties is the same in either case. The parties in either case are dealing with a right of passage across property and not with the fee thereto.

That there is no substantial distinction between the conveyance of "a right of way" which petitioner concedes to be a conveyance of an easement and the conveyance of land "for a right of way over and across property," is established in principle, by the following cases of Illinois.

In *Sullivan* v. *Eddy*, 154 Ill. 199-204, the Supreme Court held that the *reservation of*:

> "*A strip* two rods wide off from the north and west side of said premises for *a street.*" (Italics ours.)

reserved to the grantor only as easement. The same result would have followed if the Court had had before it a deed *granting*:

> "A strip two rods wide off of the north and west side of said premises for a street."

As was pointed out in the case of *Garrison* v. *Rudd*, 19 Ill. 558, the principle of construction is the same whether the interest arose by way of reservation or by way of a grant. The Court in that case rules (p. 564):

> "A right of way claimed by *express reservation* in a deed, as in this case, is subject to the same construction as in the case of an *express grant*, for what will pass by words in a grant will be excepted by like words, in an exception. Sheppard's Touchstone, 100." (Italics ours.)

The foregoing cases, if not directly, at least by analogy, hold that a conveyance of land "for a street" creates only an easement and is not a conveyance of the fee. By parity of reasoning, the same result must follow if the conveyance is "for a right of way."

Under established judicial precedent in Illinois as to the construction of right of way deeds, it is undisputably clear that the deeds here in question conveyed to petitioner's predecessor in title no more than an easement. The attempt of petitioner to develop a distinction between a conveyance "of a right of way" and a conveyance "for a right of way" is artificial to the extreme and the only semblance of judicial support therefor is the Welker case, the decision in which is not yet final.

Petitioner's Cases Considered and Distinguished.

Petitioner relies to a great extent upon the decision of the District Court for the Eastern District of Illinois in the case of *Carter Oil Co. v. Welker*, 24 Fed. Supp. 753, and the decision of the United States Circuit Court of Appeals for the Seventh Circuit handed down on November 6th, 1939, which affirms the decision of the District Court. However, *that case is still pending on petition for rehearing in the Circuit Court of Appeals of the Seventh Circuit, and the decision is not final.* Therefore, it can be given no weight as an authoritative decision of the Circuit Court of Appeals of the Seventh Circuit.

The comments of the respective Circuit Courts of Appeals in this case and in the Welker case indicate that the two Courts thought that there might be a difference in the deeds under consideration, and it is conceivable, therefore, that if the deed in the Welker case had used the same language as was used in the deeds in the present case, the Court of Appeals for the Seventh Circuit would have arrived at the same conclusion as was arrived at in the present case by the Court of Appeals for the Eighth Circuit.

In the Welker case, the Court of Appeals for the Seventh Circuit held that the words "over and across" in the granting clause of the deed under consideration refer to *the line* surveyed for the railroad track, and *not to the land*, as in the present case: (Br. 49) The Court of Appeals for the Eighth Circuit, however, said that in this case the words "over and across" are descriptive of the location of the strip of ground. (R. 148-149) These different holdings might result from the different language of the deeds in the two cases. (R. 3; 4) (Br. 44) Consequently, the Court of Appeals of the Seventh Circuit might well have held in accord with the decision of the Court of Appeals of the Eighth Circuit had the wording of the deed involved in the Welker case been the same as the wording of the deeds in this case.

But even if there is no such valid distinction between the deeds involved in these cases, the decision in the Welker case is out of harmony with the Illinois authorities.

The first case relied on by petitioner and cited by the District Court in support of the ruling in the Welker case is that of *Supervisors of Warren County* v. *Patterson*, 56 Ill. 111, which concerned a contract by which it was agreed to sell a tract of land to Warren County for court house and other county buildings, and a deed was executed in performance of this contract. The Court said that the only question in the case was as to the power of the authorities of a county to sell land which may have been purchased for the purpose of erecting thereon county buildings, and held in substance that the words "for court house" etc., did not create a condition nor limitation on the power of alienation. *The question of whether or not a conveyance conveys an easement or conveys the fee simple is in no way involved.*

The next case is *Tinker* v. *Forbes*, 136 Ill. 221, 26 N. E. 503, where a deed granted an interest in the grantor's waterpower on Rock River and, for the purpose of locating proper water wheels and races to draw said water, the east half of lot 9 in the south block. The deed further provided that no building was to be erected or business carried on on said half-lot that should materially increase the fire exposure or that should darken any light within three feet of the west line of said half-lot. In an injunction suit to restrain the erection of a building on said half-lot, the Court said that said words with reference to purpose did not constitute a condition, as there was no provision for re-entry for condition broken, nor were there any words which constituted a covenant. The Court held that in determining what restrictions the grantor intended to place upon the use of said half-lot all of these clauses must be construed together and that it was clear from all of said provisions that the parties contemplated the erection of a building on said half-lot subject to the limitations expressed. The Court reversed the case, saying that the defendant should be required to show whether his proposed building would violate the covenants. *No question of whether or not an instrument conveyed an easement or a fee simple was even remotely involved.*

The case of *Downen* v. *Rayburn*, 214 Ill. 342, 73 N. E. 364, is relied upon. In that case the conveyance was of a certain tract of land to be used as a church location together with all and singular the hereditaments and appurtenances thereunto belonging or in any way appertaining to have and to hold the said premises as above described with the appurtenances unto the said party of the second part and their successors in office forever. The Court held that a title in fee was conveyed under

the habendum clause and that the words "to be used as a church location" did not operate as a condition subsequent, saying that where real property is conveyed in fee, restrictions on its use are not favored, and that when the words "upon condition" are not used and there is no provision for re-entry, there is nothing to indicate any intention to create a condition subsequent. The Court further observed that a subsequent condition is one which operates upon an estate already created and vested and renders it liable to be defeated. *The question of what kind of conveyance constitutes the grant of an easement is not mentioned.*

The District Court then cites *Noyes* v. *St. Louis, A. & T. H. R. R. Co.* 21 N. E. (Ill.) 487, (not officially reported) but inadvertently misstates the facts, and, consequently, misconstrues the ruling in that case. The District Court says that in the Noyes case, plaintiff conveyed to a railroad company by warranty deed "for right of way" a strip of land 100 feet in width, and that thereafter in the same instrument it was recited that the above tract is granted for the erection of a freight house and other general railroad purposes. The facts in the Noyes case are that Noyes by warranty deed conveyed to the Illinois Central Railroad, for right of way, a strip of land 100 feet in width, and also to the Illinois Central Railroad and Terre Haute, Alton and St. Louis Railroad Company jointly a strip of land on the south side of the main track of the railroad, containing 20 acres, and it was to the 20 acre tract that the use for general railroad purposes referred, and not to the strip of land for a right of way. The suit concerned the 20 acre tract alone, and *no construction of that portion of the deed conveying a strip of land 100 feet in width for a right of way was in any way involved. There was no*

question of the conveyance of an easement involved or discussed. The sole question was whether the grant of the 20 acres was subject to a condition subsequent, or created a determinable fee. The Court held that the deed created no condition subsequent either expressly or by implication, and that in truth the company was not required to do anything, and even if the grant should be construed as conditional, *there was no proof of such a substantial failure to perform as would justify* the setting aside of the deed.

These four Illinois cases, upon which the District Court principally relied in the Welker case and upon which petitioner strongly relies here, are all cases involving the question of whether certain language constituted a condition subsequent, so that the property would revert to the grantor on condition broken. In all of them, the instrument admittedly conveyed a fee in the first instance, but it was claimed that this subsequent language restricted the use of the property and had the effect of causing the title to revert if some other use was shown.

Whether an instrument conveys an easement is a question different from the question of whether it conveys a fee, subject to a condition subsequent. The former is not a question of an attempt to subsequently limit the use of property which has admittedly been conveyed in fee, but the question in such case is—Does the instrument convey a fee?

Where a strip of land over and across a tract is conveyed for a right of way of a railroad, such a deed involves the right to use the strip, and does not present the question of a condition subsequent following the fee or a covenant to use land conveyed in fee for a particular purpose. The principles applicable to conditions subsequent and restrictive covenants differ from, and have no

application to, the principles applicable to instruments conveying easements. For this reason, the four Illinois cases above discussed and relied on by the District Court were inapplicable to the real issue involved in the Welker case, and are inapplicable to the question here involved.

In addition to these cases, petitioner cites *Rockford Trust Co. v. Moon*, 370 Ill. 250, 18 N. E. (2nd) 447. A mere glance at that case shows that it has no application to the deeds under consideration. There the grant was of a definitely described tract of land to a railroad company. Standing alone at the end of the deed and not in the granting clause were the words: "Growing out of the construction and operation of the railroad of said company, its successors and assigns." These words were meaningless and not part of the grant. The issue decided arose in a suit to quiet title after the land ceased to be used for railroad purposes. It was contended that the quoted words of the deed created a right of entry for condition broken or a possibility of reverter when the land ceased to be used for railroad purposes. In denying this contention the Court said (page 254):

> "Even where the deed contains words stating the consideration for or the purpose of the conveyance, they do not, of themselves, render an estate conditional * * *. The clause in the deed had no meaning whatever and stands alone."

The true question here involved is what in fact was the grant, not whether the grant was cut down by subsequent language. This distinction is so ably discussed by Judge Thomas in the opinion of the Court of Appeals of the Eighth Circuit in this case (R. 147-151; 152-153) that it seems unnecessary to say more on that point.

The Court of Appeals of the Seventh Circuit said that it did not agree with this very apparent distinction

pointed out by Judge Thomas, that while words, when used in a deed granting a fee, may be regarded as surplusage when it is claimed that they create a condition subsequent or a restrictive covenant, the same words, if used in a deed granting an easement, may constitute the essential description of the interest intended to be conveyed, and so cannot be regarded as surplusage but must be given effect.

Petitioner also says that he does not agree with this distinction. But neither petitioner nor the Court of Appeals of the Seventh Circuit even attempt to analyze the logic of Judge Thomas' reasoning on this point or to demonstrate wherein it is false, contenting themselves by saying that they do not agree with it, without citing any authority to the contrary.

That the Illinois authority is against petitioner is conclusively demonstrated by the decision in *Waller* v. *Hildebrecht*, 295 Ill. 116-118, where the Court did not hesitate to give effect to the words "to be used as an alley," and to hold that thereby an easement only was conveyed. (See opinion of Circuit Court of Appeals, R. 152-153.)

The case of *Weihe* v. *Lorenz*, 254 Ill. 195, 98 N. E. 268, is also cited by the District Court in the Welker opinion and relied on by petitioner. There the owner conveyed a portion of certain premises to Lorenz by metes and bounds and then the deed recited "and also give 10 feet adjoining on the north of said tract for alley purposes." Subsequently, the owner conveyed to Altmansberger a part of the lot described by metes and bounds, after which the deed recited: "I also give ten feet wide adjoining on the south of this tract, or the strip between this tract and the alley I gave in my deed of September 3, 1881, to John Lorenz for alley purposes." Altmans-

berger executed a mortgage without mentioning the 10-foot strip, which mortgage was foreclosed. An action in ejectment was brought by the one who succeeded to the title obtained through that action. The case was decided on the ground stated by the Court on page 197 of the opinion in the following words:

> "The appellant failed to show any title to the premises claimed, and *it will therefore be unnecessary to consider any other question.* Huegely conveyed the premises by his deed to Altmansberger. The latter omitted them from his mortgage. It is true that the description in the mortgage is followed by the words, 'being the same land conveyed to Henry Altmansberger by John Huegely and wife by warranty deed,' etc.; but that deed described two tracts while the mortgage described but one, and the effect of the words added was only to identify the tract described as being that mentioned in the deed, and not to enlarge the premises conveyed by the addition of another tract not previously described. The title, therefore, remained in Altmansberger and as Huegely had already conveyed it his subsequent deed to appellant was of no effect." (Italics ours.)

The Court then went on to say, by way of *dictum,* that even if the words "for alley purposes" referred to the conveyance to Altmansberger and not to that to Lorenz, they did not limit the estate granted, citing the above cases involving conditions subsequent, which manifestly have no application.

An analysis of the real decision in the Lorenz case shows why the Court of Appeals of the Eighth Circuit regarded that decision as of no controlling effect and why the Court of Appeals of the Seventh Circuit did not even refer to it in the opinion in the Welker case, and said that the Illinois Courts had not passed on the identical question here involved.

The quotation from *Walker* v. *Illinois Central*, 215 Ill. 610, 74 N. E. 812-814, appearing on page 27 of petitioner's brief, throws no light on the question of whether the deeds conveyed a fee or an easement. The Court there held that the deed conveyed an easement for a railroad right of way. Therefore, petitioner is incorrect in stating that the quoted statment in the Walker case is opposed to the conclusions of the Court of Appeals in the case at bar.

Public Policy Involved.

The Illinois cases heretofore discussed do not support the District Court's ruling in the Welker case, or the contention of the petitioner here, for another reason. Those cases all dealt with lands in compact form and not in gores or strips. The reasoning applicable to cases involving strips conveyed to railroads for right of way purposes across large tracts of land is not applicable to cases dealing with land in compact form. In the latter case public policy leans to a conveyance in fee, but where gores or strips are conveyed, public policy leans to the conveyance of an easement only. It requires no argument to point out that difficult situations may result in the event a fee to a narrow strip of land is in one party and the fee to the bordering property is in another.

In the case of *Paine* v. *Consumers' Forwarding & Storage Co.*, 71 Fed. (C. C. A. 6th) 626-632, it was said:

> "The evils resulting from the retention in remote dedicators of the fee in gores and strips, which for many years are valueless because of the public easement in them, and which then become valuable by reason of an abandonment of the public use, have led courts to strained constructions to include the fee of such gores and strips in deeds of the abutting lots."

See, also, the cases of *Shell Petroleum Corp.* v. *Hollow, et. al.*, 70 Fed. (2nd) (C. C. A. 10th) 811-814, and *Barker* v. *Lashbrook*, 128 Kansas, 595, 279 Pac. 12-14.

As was stated in the case of *Bowers* v. *Atchinson, T. & S. F. Ry. Co.*, 119 Kans. 202, 237 Pac. 913-914:

> "Experience revealed that separate ownership of long narrow strips of land distinct from the territory adjoining on each side, was prolific of private dispute and public disturbance, and public policy became an important factor in the interpretation."

In the case of *Gebhardt* v. *Reeves*, 75 Ill. 301-307, the Court, in applying a somewhat similar rule, said:

> "No doubt the rule, in its practical operations, subserves the public good by preventing the existence of strips of land of no great value, formerly a part of the highway, but on the abandonment of which would induce profitless and vexatious litigation. 3 Kent, 433."

It follows, therefore, that the Illinois cases relied upon by the Court in the Welker case and by the petitioner here, even if they supported the propostions for which they are cited, are distinguishable on the different public policy involved in the construction of a deed of a compact tract of land to a railroad for general railroad purposes, and a deed conveying a strip of land for right of way purposes.

This distinction is well illustrated in the case of *Danielson* v. *Woestemeyer*, 131 Kans. 796, 293 Pac. 507-511. In that case the grantor conveyed a strip of land 100 feet wide through his premises for right of way purposes. In the same deed he conveyed another tract adjacent to the right of way strip for general railroad purposes. The Court concluded that the railroad acquired only an easement in the right of way strip, but took a fee simple title

to the adjacent tract conveyed for general railroad purposes.

It is argued by petitioner that this question of public policy is not a factor if the deeds here be construed to have conveyed a determinable fee. (Br. 30.) The fallacy of this argument is that the deeds here before the Court cannot under any theory be construed as conveying a determinable fee because there is no language used in the deeds which can be construed either as a condition subsequent or a restrictive covenant, under Illinois authority, as will be shown hereafter under Point III. Therefore, to carry out this public policy, the deeds must be construed as conveying only easements.

Decision Here Under Review Is in Accord With Weight of Authority.

The decision in the Welker case and the contention of petitioner is also out of harmony with the overwhelming weight of opinion in other jurisdictions. This is conclusively demonstrated by the opinion of the Circuit Court of Appeals of the Eighth Circuit. In that opinion, the Court of Appeals collates the authorities pro and con, and there demonstrates that the weight of authority supports respondents' contention. (R. 153-154.)

For the convenience of the Court in testing the respondents' assertion that the weight of authority is contrary to the contention of petitioner, we have briefly summarized various cases holding that an easement rather than a fee was granted by the deeds therein construed.

*(1) "A strip of land measuring fifty (50) feet each way from the line of said railroad," etc.

*(1) *Alabama Great So. R. Co.* v. *McWhorter*, 202 Ala. 455, 80 So. 839.

*(2) "All of that certain lot or parcel of land * * * described as follows" (here appears description by metes and bounds) "* * * for the purpose of granting * * * a right of way."

*(3) "For public use as a highway, street or road, a strip of land sixty feet in width."

*(4) "A strip of land for a road 15 feet in width."

*(5) "All the lands * * * lying within fifty feet of the center line of the main track" etc.

*(6) "A strip of land * * * for right of way purposes."

*(7) A "strip of land one hundred feet wide * * * being the route or right of way of the railroad."

*(8) A "strip, tract or parcel of land for railroad right of way" * * * "100 feet in width, being 50 feet on each side of the center line of the Kentucky River Coal and Coke Company's railroad."

*(9) A specific description of land "containing 9.68 acres more or less. Said tract of land herein described is sold and conveyed for railroad purposes only * * *."

*(10) A deed conveying the locus upon which new track had been constructed as a strip of land sixty feet in width which was to be used "for railroad purposes only."

*(11) Certain described portions of "lots three and four * * * such portions of lots three and four * * * to be used for a track."

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*(2) *Parks* v. *Gates*, 186 Cal. 151, 199 Pac. 40.

*(3) *Forgeus* v. *Santa Cruz County*, 24 Cal. App. 193, 140 Pac. 1092.

*(4) *Smith* v. *Holloway*, 124 Ind. 329, 24 N. E. 886.

*(5) *Abercombie* v. *Simmons*, 71 Kan. 538, 81 Pac. 208.

*(6) *Roxana Petroleum Corp.* v. *Jacpis*, 127 Kan. 365, 273 Pac. 661.

*(7) *Danielson* v. *Woestemeyer*, 131 Kan. 796, 293 Pac. 507.

*(8) *Sherman, et al.* v. *Petroleum Exploration, et al.*, 132 S. W. (2nd). (Ky.) 768.

*(9) *Noel Estate* v. *K. C. S. & G. Ry. Co.*, 187 La. 717, 175 So. 468.

*(10) *Fitchburg R. R. Co.* v. *Frost*, 147 Mass. 118, 16 N. E. 773.

*(11) *Chi. Great West. Ry. Co.* v. *Zahner*, 145 Minn. 312, 177 N. W. 350.

*(12) Certain described property to have and to hold the same for so long as it should be used for right of way for tracks.

*(13) Certain described land "said tract of land hereby conveyed to be forever held and used as a public park."

*(14) Deed in usual form to convey a fee with full covenants of warranty reciting "as and for a right-of-way for said railway" appearing before the granting clause and preceding the description.

*(15) "A strip of ground fifty (50) feet in width for right of way for said railroad, over and across the following described tract of land" (describing same).

*(16) A certain strip of land one-hundred feet wide across certain lands described by government subdivision "to have and to hold the same unto the said railroad company, its successors and assigns."

*(17) "A strip of land ten feet in width on the northerly side of and adjacent to the land of the railroad and also a strip of land fifteen feet in width on the southerly side of and adjacent to said lands" of the railroad, said strips to be used for right-of-way purposes.

*(18) A parcel of land for road purposes "the said strip of twenty feet and herein conveyed for road as above stated, is to be enclosed."

*(19) "The following described land * * * being a strip sixty-six feet wide through the following described lands" (describing them).

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*(12) *Norton* v. *Duluth Transfer Ry. Co.*, 129 Minn. 126, 151 N. W. 907.

*(13) *Flaten* v. *City of Moorhead*, 51 Minn. 518, 53 N. W. 807.

*(14) *State* v. *Griffith*, 114 S. W. (2nd) (Mo.) 976, 977.

*(15) *K. C. So. Ry. Co.* v. *Sandlin*, 173 Mo. App. 384, 158 S. W. 857.

*(16) *Blakely* v. *Chicago, K. & N. R. Co.*, 46 Neb. 272, 64 N. W. 972.

*(17) *People, ex rel. N. Y. C. & H. R. R. Co.* v. *Walsh*, 211 N. Y. 90, 105 N. E. 136.

*(18) *Wason* v. *Pilz*, 31 Ore. 3, 48 Pac. 701.

*(19) *City of Knoxville* v. *Phillips*, 162 Tenn. 328, 36 S. W. (2nd) 434-436.

*(20) "Sell and convey * * * for road and water purposes all the following described tracts" (describing them).

*(21) "Sell and convey * * * for the purpose of constructing, operating and maintaining its railroad, the right-of-way 200 feet in width, over and upon the above described tract of land; together with the right to take and use all the timber, earth, stone and mineral existing or that may be found within the right-of-way hereby granted."

*(22) A certain strip of land "for the use of a plank-road."

*(23) Warranty deed to forty acres "reserving and excepting therefrom, however, a strip of land extending through the same * * * of the width of four hundred feet,—that is, two hundred feet on each side of the center line of the Northern Pacific Railroad, or any of all its branches,—to be used for a right of way and other railroad purposes."

The foregoing conclusively establishes that the ruling of the Court of Appeals that the deeds in question granted petitioner's predecessor in title only an easement for railroad purposes was correct and in harmony with applicable Illinois authority and the great weight of authority in other jurisdictions.

III.

The deeds in question do not convey a base, qualified or determinable fee.—

Petitioner claims that if the language "for right of way" be construed as a condition or limitation, the con-

*(20) *West Texas Utilities Co.* v. *Lee*, 26 S. W. (2nd) (Tex. C. A.) 457.

*(21) *Right of Way Oil Co.* v. *Gladys City Oil, Etc. Co.*, 106 Tex. 94, 157 S. W. 737.

*(22 *Robinson* v. *Missisquoi R. Co.*, 59 Vt. 426, 10 Atl. 522.

*(23) *Biles* v. *Tacoma O. and G. H. R. Co.*, 5 Wash. 509, 32 Pac. 211.

veyance would not necessarily be an easement, but rather a base, qualified or determinable fee. The fallacy of this argument is that the language "for right of way," which appears in the granting clause preceding the section description, is not a condition or limitation on the grant of a fee, but is a description of the estate granted, so that only an easement is conveyed.

In fact, the very Illinois cases cited and so strongly relied upon by petitioner show that the deeds in question cannot be construed to convey a base, qualified or determinable fee. Under Illinois law if the words "upon condition" are not used and there is no provision for right of re-entry for condition broken, there is nothing to indicate an intention to create a base or determinable fee, and therefore the deeds cannot be given that effect.

For instance, the quotation from the case of *Tinker* v. *Forbes*, 136 Ill. 221, 26 N. E. 503, appearing on pages 17 and 18 of petitioner's brief, shows that the words "for right of way" cannot constitute a condition, as there is no provision for re-entry for condition broken, nor can such language be construed as a restrictive covenant. To the same effect is *Downen* v. *Raybuck*, 214 Ill. 342, 73 N. E. 364, also relied upon by petitioner.

Therefore, the only way by which said words can be given effect is to construe the conveyance as creating an easement, which is the proper construction in this case.

This contention that the deeds convey a determinable fee, as appears from the foregoing cases, is not predicated upon Illinois law. The Illinois law is that a conveyance to a railroad for a right of way is an easement. Petitioner can cite no case of the Illinois Courts holding that a conveyance "of a railroad right of way" or "to a railroad for right of way" conveys a determinable fee. The only Illinois law on the subject is to the contrary.

In the case of *Branch* v. *Central Trust Co.*, 320 Ill. 432-442, where a railroad right of way was conveyed, it was expressly held that in Illinois a grant of a right of way to a railroad company does not convey a fee, but only conveys an easement.

As a matter of fact, the only Illinois case cited by petitioner on this point (Br. 22) is that of *Chicago and Mississippi Railroad Company* v. *Patchin*, 16 Ill. 198, which negatives any such contention. We quote the very portion of this decision relied upon by petitioner (P. 202):

> "I presume the right to the land upon which railroads are built, is not strictly analogous to the easement of the public in highways, leaving the fee in the owner of the soil, but is an absolute ownership in fee *for railroad purposes.*"

"For railroad purposes" means the exclusive use for the operation of a railroad. No one could reasonably contend that a railroad purpose includes the exploration, drilling and marketing of oil and gas.

This, likewise, is the theory of this Court as appears from the case of *Western Union Telegraph Co.* v. *Penn. R. Co.*, 195 U. S. 540-570, cited by petitioner at page 22 of his brief. Petitioner, however, does not quote enough to indicate what this Court meant when it stated that railroad right of way was more than an easement. On that same page this Court cites with approval the case of *Philadelphia and R. R. Co.* v. *Hummell*, 44 Pa. 375, 84 Am. Dec. 457, where it is said of a railroad right of way:

> "It is 'a fee in the surface and so much beneath it as may be necessary for support * * *.'"

This sentence indicates what was meant by this Court in that case. That is, that a railroad may own the fee in the surface of its right of way plus as much beneath the surface as may be necessary for the support thereof.

Surely, no one would contend that it is necessary for the support of the surface of a railroad right of way that the railroad company shall also own and have the right to remove and sell the oil and gas thereunder. When properly analyzed, *Western Union Telegraph Co.* v. *Penn. R. Co. supra,* is no authority on the issue of who owns the oil and gas beneath the railroad right of way here involved.

The case of *Walker* v. *I. C. R. R. Co.*, 215 Ill. 610, 74 N. E. 812-815, quoting from the case of *Hazen* v. *Boston and Maine R. R. Co.*, 2 Gray 574-580, states the following:

> "'The right acquired by the corporation, though technically an easement, yet requires for its enjoyment a use of the land permanent in its nature and practically exclusive'."

This language explains clearly that what is meant by the Courts when they state that a railroad easement is not strictly analogous to the easement in public highways, namely, that the use of the surface for railroad purposes is exclusive in favor of the railroad company.

Petitioner also cites *Rio Grande Western Ry. Co.* v. *Stringham*, 239 U. S. 44-47, and *Kern River Co.* v. *United States*, 257 U. S. 147-151. These cases involved a right of way acquired by a railroad by proceeding in the land department under a Statute of the United States. It was held that under the true effect of this Act, a fee simple title on an implied condition of reverter was granted to the railroad. The decisions depended wholly on the meaning of the Statute, and not upon the construction of a deed, and have no application here.

The fallacy of petitioner's claim that these deeds convey a base, qualified or determinable fee, rather than an easement, is further pointed out in the opinion of the Court of Appeals in this case. (R. 151-152.)

Respondents assume that this Court will be guided by the declared law of Illinois and that it will not, by its opinion, create an estate not heretofore sanctioned by the Illinois Courts, and particularly where the admitted reason is to give to the petitioner an interest and rights that petitioner's predecessor in title never contracted for, namely, the oil and gas underlying the right of way.

We quote from petitioner's brief at page 30:

> "As forecast above, however, we do not concede that an easement affords substantially the same right as would be accorded by a base fee conditioned on use for railroad right of way, if for no other reason than because this latter conveyance would give grantee the oil and mineral rights pending the contingency upon which possibility of reverter depends, while an easement would accord the mere right of limited use without the right of profit from the minerals."

This is a bald statement of the purpose of such a contention. We respectfully suggest to the Court that the farmers who made this grant intended no such consequences. Every one of those original grantors, their heirs or their grantees, have a direct and substantial interest in this case, in that, under leases upon which respondents' rights are predicated, these original grantors, their heirs or grantees, have a right to royalties which are of substantial value.

Neither under Illinois law nor under the equities of the situation is such a construction permissible.

IV.

If it be held that petitioner has only an easement, the Bankruptcy Court had no jurisdiction to enter the order adjudicating adverse claims to property not in the possession of the Trustee, and said entire order was wholly void, including the authorization to petitioner to drill wells on said premises to be paid for out of the proceeds of the oil.

Petitioner, under Point II of his brief, argues that if this Court be of the opinion that petitioner has no more than an easement for railroad purposes in the property in question, and hence had neither actual nor constructive possession of the oil underlying the right of way and no right to it, the Bankruptcy Court nevertheless had jurisdiction to enter orders authorizing the Trustee to drill for oil, sell the same, impound the proceeds, and to pay the net, after deducting the cost of the wells drilled, to the parties entitled thereto.

The implications of this argument are astounding in view of the ruling of this Court in *Taubel-Scott-Kitzmiller Co., Inc.* v. *Fox, et al.*, 264 U. S. 426. The very premise of the argument, as appears from page 34 of petitioner's brief, is that the Trustee, when he applied summarily to the Bankruptcy Court to determine adverse claims, had neither actual or constructive possession of the property. Despite this premise it is argued that the Court may nevertheless, under such circumstances, have jurisdiction to enter collateral orders. Such a contention is not supported by any authority and in fact is negatived by the ruling of this Court in the *Taubel-Scott-Kitzmiller Co. Inc.* case.

This Court, in that case, specifically pointed out that

the summary jurisdiction of a Bankruptcy Court is limited to a situation in which the Trustee has actual or constructive possession of the property to which there are adverse claims unless jurisdiction is otherwise acquired by consent. In the instant case, from its inception, respondents have contended that the Bankruptcy Court had no jurisdiction in that the Trustee was not in actual or constructive possession of the property, because the deeds upon which the jurisdiction, if any, was predicated, granted no more than an easement.

Once it is assumed that the Trustee was not in actual or constructive possession of the property, which is petitioner's assumption in the second part of his brief, then the basis of jurisdiction to entertain this summary proceeding has disappeared and it is a proceeding without a jurisdictional foundation.

The Court of Appeals reached this same conclusion when it decided that the deeds conveyed no more than an easement. It, therefore, found that the Bankruptcy Court was without jurisdiction; that is, the determination of the proper construction of the deeds also determined the question of jurisdiction. All facts necessary to determine the jurisdiction appeared on the face of the petition. It, therefore, follows that under such a construction of the deeds, the Bankruptcy Court was acting without jurisdiction and all of its orders were void and in excess of and beyond its jurisdiction.

The Court of Appeals further pointed out that if such be the proper construction of the deeds, the action of the District Court, in appointing a receiver *pendente lite*, when the lack of jurisdiction was apparent on the face of the petition, was not only void, but an abuse of discretion, and cited in support thereof substantial and persuasive authority, not only of this court but of other Circuit Courts of Appeals.

On this the Court below ruled as follows (R. 155):

> "Counsel for appellee in their briefs argue that even conceding that the court was without jurisdiction to determine title to the mineral and oil rights because the Trustee was not in actual or constructive possession, that part of the order appointing a receiver *pendente lite* with authority to take possession, drill wells and extract and sell the oil was not an abuse of discretion. It cannot be said that the appointment of a receiver under such circumstances is not erroneous nor that if he takes possession from the owner under such a void appointment that his act is not wrongful. Compare: *Buturite Coal Co.* v. *Riggs*, 274 U. S. 208; *Lion Bonding & Surety Co.* v. *Karatz*, 262 U. S. 640; *Atlantic Trust Co.* v. *Chapman*, 208 U. S. 360; *United States* v. *Stone*, 7 Cir. 187 Fed. 577; *Noxon Chemical Products Co.* v. *Leckie*, 3 Cir. 39 F. (2d) 318; *W. F. Potts Son & Co.* v. *Cochrane*, 5 Cir. 59 F. (2d) 375; *Beach* v. *Macon Grocery Co.*, 5 Cir. 125 Fed. 513; *In re Forty-one Thirty-six Wilcox Bldg. Corp.*, 7 Cir., 100 F. (2d) 588."

The foregoing ruling is particularly appropriate in this case. Under the facts as they appear from the record below, there were approximately 10,000 barrels of oil per acre lying beneath the eight acres covered by the right of way in controversy. This would amount to about 80,000 barrels of oil and would be worth approximately $80,000, but, because wells drilled on the right of way would draw oil from surrounding territory, petitioner's experts testified that the Trustee expected to recover approximately 400,000 barrels of oil. (R. pp. 109-111.)

Petitioner here in his statement of facts goes outside the record to point out that petitioner has recovered in excess of $472,000 worth of oil.

Obviously, if petitioner's experts are correct, all of this oil could not have been located under the right of way. This sum of $472,000 represents oil to which respondents

and others are entitled, and royalties to which respondents' lessors are entitled. Nevertheless, petitioner, under such a hypothesis, would have this Court sanction drilling operations conducted under a void order of Court, where oil has been recovered from property outside the right of way and under lease to respondents.

This argument of petitioner, in its final analysis, is to the effect that even though petitioner had no more than an easement, and even though petitioner, as a Trustee in Bankruptcy, had neither actual nor constructive possession of the oil, yet he, under protection of a Court of Bankruptcy, may drill a number of wells on the right of way and recover and sell oil not only from property, the title to which is in dispute, but from other property admittedly belonging to other parties and under lease to respondents.

In other words, no risk and all gain at the expense of the other party's property. No bond was posted and respondents in the Bankruptcy Court were enjoined and forced to sit by while these operations were carried on. These operations were carried on with the Trustee being fully cognizant of the respondents' claim.

If respondents are correct, there could be no more inequitable way of depriving them of their property than by the order entered by the Bankruptcy Court, which in effect forces them out of their own property to pay in excess of $200,000 for wells which they did not drill and did not need.

In an attempt to justify this position, petitioner cites a group of cases on pages 35 to 39 of his brief. The Bankruptcy cases cited are distinguishable from the instant case, in that the want of jurisdiction did not appear on the face of the summary petition. (*Irving Trust Co.* v. *Wieser Products Corp.* 71 Fed. (2d) 681.)

The other federal cases announcing the rule that a Bankruptcy Court has the jurisdiction, as a preliminary inquiry, to determine its own jurisdiction to examine the merits of an adverse claim are inapplicable, in that the Bankruptcy Court, in this instance, exercised that very right, and under the hypothesis of this portion of petitioner's brief, decided it wrongfully.

The other cases, such as *Malone* v. *Barnett*, 87 S. W. (2d) (C. C. A. Tex.) 523, and *State of Oklahoma* v. *State of Texas*, 252 U. S. 372, were plenary suits and the courts in those cases were exercising a jurisdiction of a quality and character different from the summary jurisdiction of a bankruptcy court. The limited character of this jurisdiction has been defined by this Court in the case of *Taubel-Scott-Kitzmiller Co. Inc., supra.*

If the deeds in question conveyed to the Trustee no more than an easement for railroad purposes, then the Bankruptcy Court in this summary proceedings was acting in excess of and beyond its jurisdiction and all of its orders and its decision were void, including the appointment of a receiver *pendente lite*, and by appropriate subsequent proceedings the respondents will be entitled to such remedy as the law affords for the loss of their property under such circumstances.

CONCLUSION.

It is respectfully submitted that the writ of certiorari was improvidently issued in this case and should be dismissed.

If, however, this court be of a contrary opinion, respondents maintain that the Court of Appeals properly held, in accordance with applicable Illinois decisions on the construction of deeds and the overwhelming weight of authority elsewhere, that the deeds to the Railroad Company conveyed only a railroad right of way easement, so that the grantee acquired no rights in and to the oil and gas underlying this property.

Furthermore, the Court of Appeals properly decided that, since the property involved was not in the actual or constructive possession of the Trustee, the Court had no jurisdiction, without consent of the parties, to adjudicate adverse claims to the title to the property or to authorize the Trustee to take possession of and drill wells on said property and extract and sell the oil therefrom.

Therefore, the judgment of the Circuit Court of Appeals of the Eighth Circuit should be in all respects affirmed.

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